Kementerian Pertahanan Malaysia & Anor v Malaysian International Shipping Corp Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–6 OF 2003
GOPAL SRI RAM, AZMEL AND ZALEHA ZAHARI JJCA
13 JUNE 2007

Civil Procedure — Government Proceedings — Locus standi — Authority to act on behalf of the Government of Malaysia — No evidence of having been appointed by Attorney General's Chambers — Whether solicitor had shown any authority to act — Government Proceedings Act 1956 s 24(3)

Insurance — Marine insurance — Damage to goods — Indemnity against loss or damage arising from all shipping and sending — Damage caused to certain equipment during carriage/transportation from ship to terminal — Insurers admitted liability — Settlement that equipment would be replaced by supplier — Whether agreement to indemnify appellants amounted to discharge of contract — Whether appellant's rights had been subrogated to insurers

Insurance — Subrogation — Damage to equipment — Failure to plead — Whether doctrine of subrogation and/or its particulars were material facts which must be pleaded

Interpretation — 'Subrogation' — Meaning of — Action instituted against third party — Third party's rights remain exactly the same whether being sued by insurer or assured — Existed from moment of making contract of indemnity

The appellants were, with effect from 20 October 1992, insured by Perdana Cigna Insurance Bhd under a marine open policy against loss or damage arising from all shipping and sending. The policy issued by the insurers was at all time a contract of indemnity. It included inter alia, a subrogation clause, that at the request of the insurers, the appellants shall subrogate to the insurers their rights and claims against others and permit a suit to be brought in the appellants' name at the Insurers' expense. The appellants had, on 23 February 1995, submitted a claim in respect of damage caused to certain equipment on 19 April 1994 during the carriage/transportation from the ship to the terminal for storage pending delivery to the appellants, as consignee. The insurers admitted the appellants' claim. However, prior to the payment, and pursuant to the terms of the policy, in exercise of the insurers right of subrogation, Messrs Shook Lin & Bok, having been retained by the insurers, at the insurers' expense, filed two suits in the appellants' name. The first respondent had applied to strike out the suit instituted against them on the ground that Messrs Shook Lin & Bok had no authority to act on behalf of the second

appellant for failure to furnish any evidence confirming that they have been appointed to act for the Government of Malaysia by the Attorney-General's Chambers. The senior assistant registrar however, dismissed the first respondent's application. On appeal, the judge allowed his appeal, thereby reversing the decision of the SAR. The second and third respondents had agreed to be bound by the decision of the High Court judge although they did not themselves file an application to strike out.

Held, allowing the appellants' appeal with costs:

(1) The insurers, at all times was dominus litus of the proceedings. Messrs Shook Lin & Bok had been duly appointed by the insurers to institute proceedings in the appellants' names to recover the loss. The learned High Court judge erred in holding that Messrs Shook Lin & Bok lacked authority to file proceedings in the name of the Government of Malaysia in respect of the rights subrogated to the insurers (see para 10).

(2) It was abundantly clear that prior to the filing of these suits, the insurers had admitted liability under the insurance policy. An agreement was already in place as between the appellants and the insurers, by which agreement the appellants were to be compensated by way of reinstatement of the damaged items insured under the insurance policy by GEC-Marconi Radar and Defence Systems Ltd (the manufacturer of the damaged items) and that the costs of the reinstatement would be borne by the insurers. The implementation of this agreement between the Insurers and the appellants was the foundation upon which the appellant's rights have been subrogated to the insurers. The appellants had, on the facts of this case, been recompensed in accordance with the terms agreed upon (see para 11).

(3) As the right of action existed the moment a contract of indemnity was entered into, the insurers were entitled to exercise their right of subrogation under the contract of indemnity the moment the insurers agreed to accept liability of the appellants claim under the marine open policy, which was on 4 April 1995. As from this date, 4 April 1995, the insurers were entitled to 'step into the shoes' of the appellants to pursue their claim against the respondents. The time of the actual transmission of monies by the insurers to GEC-Marconi was irrelevant as such transmission merely amounted to a term of the settlement entered into between the insurers and the appellants (see para 12).

[Bahasa Malaysia summary

Perayu-perayu telah, sejak dari 20 Oktober 1992, diinsuranskan oleh Perdana Cigna Insurance Bhd di bawah polisi laut terbuka terhadap kehilangan atau kemusnahan yang timbul daripada pengangkutan dan penghantaran. Polisi yang dikeluarkan penanggung insurans pada keseluruhannya adalah merupakan kontrak indemniti. Ianya termasuk, antara lain, klausa subrogasi di mana, atas permintaan penanggung insurans, perayu-perayu akan diletakganti kepada penanggung insurans hak masing-masing terhadap pihak lain dan seterusnya membenarkan tindakan diambil di atas nama perayu-perayu dan perbelanjaannya ditanggung pihak penanggung

insurans. Perayu-perayu telah, pada 23 Februari 1995, membuat tuntutan terhadap kerosakan peralatan yang berlaku pada 19 April 1994 semasa pengangkutan/pemindahan dari kapal ke terminal bagi tujuan penyimpanan, iaitu sementara menunggu penghantaran kepada perayu-perayu selaku konsainan. Penanggung insurans telah mengakui tuntutan perayu-perayu. Walau bagaimanapun, sebelum pembayarannya, dan mengikut terma polisi, dalam mempergunakan hak subrogasi penanggung insurans, pihaknya telah melantik Tetuan Shook Lin & Bok untuk memfailkan dua tindakan mahkamah di atas nama perayu-perayu dan perbelanjaannya ditanggung mereka. Responden pertama telah memohon untuk membatalkan tindakan terhadap mereka atas alasan bahawa Tetuan Shook Lin & Bok tidak mempunyai hak bertindak bagi pihak perayu kedua atas kegagalan mengemukakan keterangan yang mengesahkan bahawa mereka telah dilantik untuk bertindak bagi pihak Kerajaan Malaysia dari Jabatan Peguam Negara. Walau bagaimanapun Penolong Kanan Pendaftar telah menolak permohonan tersebut. Setelah mendengar rayuan, Hakim Mahkamah Tinggi telah membenarkan rayuan Responden pertama dan seterusnya mengenepikan keputusan SAR. Walaupun Responden kedua dan ketiga tidak memfailkan permohonan pengenepian, mereka telah bersetuju untuk terikat dengan keputusan Hakim Mahkamah Tinggi.

Diputuskan, membenarkan rayuan perayu-perayu dengan kos:

(1) Sepanjang prosiding tersebut penanggung insurans merupakan dominus litus. Tetuan Shook Lin & Bok dilantik dengan sempurnanya oleh penanggung insurans bagi memulai prosiding di atas nama perayu-perayu untuk mendapatkan ganti rugi. Hakim Mahkamah Tinggi terkhilaf bila memutuskan bahawa Tetuan Shook Lin & Bok tidak mempunyai kuasa untuk memfailkan prosiding di atas nama Kerajaan Malaysia terhadap hak subrogasi kepada penanggung insurans (lihat perenggan 10).

(2) Adalah amat jelas bahawa sebelum tindakan difailkan, penanggung insurans telah menerima liabiliti di bawah polisi insurans. Suatu perjanjian telah wujud di antara perayu-perayu dengan penanggung insuran, di mana mengikut perjanjian tersebut perayu-perayu akan dibayar ganti rugi dengan mengganti semula barang yang rosak di bawah polisi insuran oleh GEC-Marconi Radar dan Defence Systems Ltd (pengilang barang yang musnah) dan kos penggantian semula akan dibiayai oleh penanggung insurans. Implimentasi perjanjian ini di antara penanggung insurans dengan perayu-perayu merupakan asas bagi perayu-perayu mensubrogasikan hak kepada penanggung insurans. Perayu-perayu telah, berpandukan fakta kes ini, diberi ganti rugi mengikut terma yang dipersetujui tersebut (lihat perenggan 11).

(3) Memandangkan hak sesuatu tindakan wujud sebaik sahaja kontrak indemniti dimeterai, penanggung insurans berhak untuk menggunakan hak subrogasi di bawah kontrak indemniti sebaik sahaja penanggung insurans bersetuju menerima liabiliti terhadap tuntutan perayu-perayu di bawah Polisi Laut Terbuka yang bertarikh 4 April 1995. Dari tarikh tersebut, penanggung insurans berhak untuk mengambil tempat perayu-perayu bagi membuat tuntutan terhadap responden-responden. Masa sebenar pengiriman wang oleh

penanggung insurans kepada GEC-Marconi adalah tidak relevan kerana perjalanan pengiriman tersebut hanyalah setakat penerimaan terma persetujuan oleh penanggung insurans dan perayu-perayu (lihat perenggan 12).]

Notes

For a case on damage to goods under marine insurance, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 199.
For a case on damage to equipment, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2838–2855.
For cases on government proceedings generally, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2838–2855.

Cases referred to

Castellain v Preston [1883] Vol IX QBD 380 (refd)
Hobbs v Marlowe [1978] AC 16 (refd)
Poh Chu Chai King v Victorea Insurance Company Ltd [1986] AC 250 (refd)
State Government Insurance Office v Brisbane Stevedoring Pty Ltd [1969] 123 CLR 228 (refd)

Legislation referred to

Government Proceedings Act 1956 s 24(3)

Appeal from: Suit No D1–21–1 of 1995 (High Court, Kuala Lumpur)

M Nagarajah (Alvin Tang with him) (Shook Lin & Bok) for the appellants/plaintiffs.
Eric Siow (Lee Ong & Kandiah) for the first respondent.
Jason Wee (Tommy Thomas) for the second respondent.

Zaleha Zahari JCA (delivering judgment of the court):

[1] The appellants were insured by Perdana Cigna Insurance Bhd ('the insurers') under a Marine Open Policy against loss or damage arising from all shipping and sendings on or after 20 October 1992. The policy issued by the insurers was at all times a contract of indemnity. The policy, inter alia, included a subrogation clause, that at the request of the insurers, the appellants shall subrogate to the insurers their rights and claims against others and permit a suit to be brought in the appellants' name at the insurers' expense.

[2] By letter dated 23 February 1995, the appellants submitted a claim in respect of damage caused to certain equipment on 19 April 1994 during the carriage/transportation from the ship on discharge to the terminal for storage pending delivery to the appellants, as consignee. Letter dated 4 April 1995, Minutes of Meeting held on 4 April 1995, letter dated 27 April 1995 to GEC-Marconi Projects (Malaysia) Sdn Bhd and letter dated 2 August 1995, show that the insurers admitted the appellants' claim. The settlement arrived at was that the damaged equipment would be replaced by the supplier, GEC-Marconi Projects (Malaysia)

Sdn. Bhd. ('GEC-Marconi') and that payment would be made directly to GEC-Marconi. Subsequently, on 21 May 1997, consequential upon the agreement between the insurers and the appellants, the insurers paid to GEC-Marconi a sum of £176,987.

[3] However, prior to the above payment, on 19 April 1995, pursuant to the terms of the policy, in exercise of the insurers right of subrogation, Messrs Shook Lin & Bok, having been retained by the insurers, at the insurers' expense, filed two suits in the appellants' names namely Kuala Lumpur High Court No D1–27–21–1995 against Malaysia International Shipping Corporation ('MISC', the first respondent in this appeal) and Kuala Lumpur High Court No D1–21–1–1995 against Kelang Container Terminal Bhd and Kontena Nasional Bhd (the second and third respondent in this appeal).

[4] Both actions were subsequently consolidated pursuant to court order dated 9 February 1998. Thereafter, on 28 April 1999, MISC, the first respondent in this appeal, filed an application to strike out the suit instituted against them on the ground that Messrs Shook Lin & Bok had no authority to act on behalf of the 2nd Appellant for failure to furnish any evidence of having been appointed by the Attorney General's Chambers confirming that they have been appointed to act for the Government of Malaysia.

[5] The first respondent's striking out application was dismissed by the senior assistant registrar ('SAR') on 16 February 2001. On appeal by the first respondent to the judge-in-chambers against the SAR's decision, on 19 April 1994, the judge allowed the first respondent's appeal, reversed the decision of the SAR, and struck out the appellants' suit with no order as to costs. The second and third respondent have agreed to be bound by the decision of the High Court Judge although they did not themselves file an application to strike out.

[6] The judge was of the view that s 24(3) of the Government Proceedings Act 1956 ('the Act') was applicable. He then ruled that Messrs Shook Lin & Bok had no authority to act on behalf of the Government of Malaysia as they had failed to furnish any evidence of having been duly retained by the Attorney General's Chambers to act for the Government of Malaysia. The Judge ruled that a solicitor who has not shown any authority to act for the party he purports to act, the suit filed by him must by struck out. The judge was further of the view that the doctrine of subrogation and/or its particulars were material facts which must be pleaded. He then ruled that the failure to plead the doctrine of subrogation and particularizing the facts giving rise to the same in the statement of claim, was fatal. As for letter of subrogation dated 21 May 1997, the judge was of the view that that letter was not a proper letter of subrogation by reason of that letter not having been issued by the insured party under the policy. The judge was of the view that based on the facts in this case the proper party to be cited as plaintiffs was not the Government of Malaysia, nor the Malaysian Ministry of Defence but GEC-Marconi Projects (Malaysia) Sdn Bhd, the party who received payment under the said policy. He was further of the view that no right of subrogation accrued to the insurers until full payment under the policy had been

effected. Noting that the letter giving the insurers the right to institute proceedings was dated 21 May 1997, he found the institution of proceedings against the respondents in 1995 to be premature.

[7] In determining the issues in this appeal we took into consideration the following principles. 'Subrogation' is concerned with the mutual rights and liabilities of parties to a contract of insurance. Pursuant to a contract of insurance, where an insurer indemnifies an assured for a loss, he is entitled to 'stand in the shoes' of the assured and to receive the benefit of all of the rights and remedies which the assured may have against third parties in respect of such loss (*Insurance Law in Australia*, Kenneth Sutton; *Castellain v Preston* [1883] Vol IX QBD 380). This right is inherent in a contract of indemnity. It does not depend for its existence upon the occurrence of a loss under the policy but its exercise is of course dependent upon the payment of the loss. But as a right, it exists from the moment of the making of the contract of indemnity (see *State Government Insurance Office v Brisbane Stevedoring Pty Ltd* [1969] 123 CLR 228 at p 240, per Barwick C.J.].

[8] The cause of action in such cases at all times lies with the assured. Other than the assured, no one else can institute any remedy. As against the wrongdoer the insurer has no cause of action of his own (*Hobbs v Marlowe* [1978] AC 16 at p 37). The assured must bring an action against the wrongdoer if he is called upon by his insurer to do so and is indemnified against the costs, but it is the assured's cause of action, not that of the insurer, that he sues on. The assured, is a nominal Plaintiff. The real plaintiff is the subrogated insurer as they are the one instructing solicitors, paying for the action, and the person to benefit from the action, and to lose by the action, if it is lost. Should an action be instituted against a third party, the third party's rights remain exactly the same whether he is being sued by the insurer or the assured.

[9] On the issue of whether Messrs Shook Lin & Bok has the locus standi of to act for the Government of Malaysia, it is common ground that an authorization under s 24(3) of the Act had not been issued by the Attorney General as evident from the letter of the Senior Federal Counsel, Ministry of Defence dated 7 June 1999. The stand taken by the Attorney General was that, as the Government of Malaysia, the assured, were merely lending their names to the insurers for the enforcement of the appellants' rights and remedies as against the respondents to which the insurers has been subrogated, an authorization under s 24(3) of the Act was not necessary.

[10] We agree. Although the cause of action in the suits filed is that of the appellants, by reason of the insurers having the carriage and control of the suits, the right to appoint solicitors to pursue the claim against the respondents clearly lies with the insurers, not the appellants. The insurers, at all times was dominus litus of the proceedings. Messrs Shook Lin & Bok has been duly appointed by the insurers to institute proceedings in the appellants' names to recover the loss. In this situation we are of the view that the learned High Court judge erred in holding that Messrs Shook Lin & Bok lacked authority to file proceedings in the name of the Government of Malaysia in respect of the rights subrogated to the insurers.

[11] It is abundantly clear that prior to the filing of these suits, the insurers had admitted liability under the insurance policy. An agreement was already in place as between the appellants and the insurers, by which agreement the appellants were to be compensated by way of reinstatement of the damaged items insured under the insurance policy by GEC-Marconi Radar and Defence Systems Limited (the manufacturer of the damaged items) and that the costs of the reinstatement would be borne by the insurers. The implementation of this agreement between the insurers and the appellants was the foundation upon which the appellant's rights have been subrogated to the insurers. The appellants had, on the facts of this case, been recompensed in accordance with the terms agreed upon.

[12] We are of the considered view that an insurer's agreement to indemnify the appellants' in respect of the damaged equipment under the policy of an insurance in issue amounts to the discharge of the contract and thereafter the insurers has been subrogated with the appellants' rights in respect the claim. Once subrogated, the insurers are the masters of the assured's right to sue. As the right of action exists the moment a contract of indemnity is entered into, the insurers are entitled to exercise their right of subrogation under the contract of indemnity the moment the insurers agreed to accept liability of the appellants claim under the Marine Open Policy, which was on 4 April 1995. As from this date, 4 April 1995, the insurers were entitled to 'step into the shoes' of the appellants to pursue their claim against the respondents. The time of the actual transmission of monies by the insurers to GEC-Marconi was irrelevant as such transmission merely amounted to a term of the settlement entered into between the insurers and the appellants. In questioning the timing of the transmission of monies, the first respondent was in essence challenging the said settlement, which the first respondent has no right to question. (*Law of Insurance*,*Poh Chu Chai King v Victorea Insurance Company Ltd* [1986] AC 250 (PC)). The commencement of the consolidated suits on 19 April 1995 against the respondent was, in this situation, not premature. In any event the time of subrogation is of no relevance to the first respondent, since their rights remain exactly the same whether the suit is controlled by the insurers, or the assured.

[13] On the issue of subrogation not being pleaded, it is appropriate to reiterate the function of pleadings is to give notice of the case which has to be met by the opposing party. The purpose of particulars is to define the issues and to indicate to the opposing party how much range of his possible evidence will be relevant to meet those issues. In the circumstance of the present case the appellants need only state in summary form facts which they are relying on for the purpose of formulating a complete cause of action against the respondents, ie the alleged negligent acts of the respondent and/or their agents resulting in loss and damage. In our considered opinion there is no necessity to plead the doctrine of subrogation and particulars giving rise to the same.

[14] For the reasons above, the appellants' appeal is allowed with costs. Costs of this appeal to follow event at trial. The deposit is to be paid to appellants. All orders of the High Court judge are set aside, the writs restored to file and the case reverted back to the High Court for mention. The respondents was given leave to amend their

respective statement of defence within 14 days, and the appellants to file a reply within 30 days, from the date of this decision.

Appellants' appeal allowed with costs.

Reported by Ashgar Ali Ali Mohamed